SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

1967

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NO. ~~181~~ OCTOBER TERM, 1966

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

REPLY BRIEF FOR PETITIONER

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IN THE

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NO. 181 OCTOBER TERM, 1966

ANTHONY M. GROSSO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETIONER

1. Respondent finds a "crucial" distinction, with regard to the privilege against self-incrimination, between a conviction for failure to pay taxes, as in this case, and a conviction for failure to register, as in *Costello v. United States,* certiorari granted 383 U.S. 942 (1966) and suggests that it is "only the compulsory registration which presents the self-incrimination issue" decided in *Kahriger* and *Lewis.* (Res.Br. 5). The cases rebut any such distinction. Kahriger was charged on an information containing two counts, one for failure to pay the occupational tax required by 26 U.S.C. § 3290 (now § 4411), and the other for failure to register as required by 26 U.S.C. § 3291 (now § 4412). Transcript of Record, *United States v. Kahriger,* No. 167, O. T. 1952, p. 2. Costello was charged in two separate indictments. The first indictment charged him and others with conspiring to fail to pay the occupational tax imposed by § 4411. The second indictment contained two counts,

one for failure to pay the tax under §4411 and one for failure to register under § 4412. Costello was convicted on all counts. He received concurrent prison sentences and fines on the conspiracy indictment and the § 4411 count, and a suspended sentence and probation on the § 4412 count. *United States v. Costello,* 352 F. 2d 848, 849-850 (2d Cir. 1965).

If the respondent's suggested distinction were sound, both Kahriger and Costello could have been convicted on the payment count, even if they had a constitutional defense to the registration count. This Court would hardly have granted certiorari in Costello's case on a question about "the federal wagering tax statutes here involved" if the constitutional issue can be raised only with regard to the suspended sentence imposed for failure to register. But the point is put beyond speculation by the *Lewis* case, for there the information contained but a single count, and Lewis was charged only with failure to pay the tax imposed by what is now § 4411. Transcript of Record, *Lewis v. United States,* No. 203, O.T. 1954, p. 1. The self-incrimination issue squarely decided in *Lewis,* and explicitly set for reconsideration in *Costello,* could only be with regard to payment of a tax, not registration.

Nor do the four cases cited by respondent (Res.Br. 5) support the proposition that this Court has consistently sustained taxes on income derived from unlawful sources even though the taxpayer might be supplying information which could be used in a prosecution against him. These cases hold only that unlawful income can be taxed—a proposition not challenged here—and did not involve, as we read them, any issue of self-

incrimination of the sort now tendered. Petitioner concedes the government's right to tax his income from whatever source derived, and to impose excise taxes on particular forms of income. Petitioner claims, however, that if the government wishes to compel him to pay such a tax, when to do so would require him to give testimony against himself in a criminal proceeding, it must give him immunity from criminal prosecution.

2. The second question tendered by the Petition has a broader thrust than respondent conceives, as is evident from respondent's reformulation of it. (Compare Pet. 2 with Res.Br. 2) It is not only the possibility that the oral instruction of the court might have been embellished by the bailiff which concerns petitioner. Petitioner asserts his constitutional right not to have any communication between court and jury in his absence, whether the communication was from court to jury or from jury to court. Petitioner is concerned as much by the note which the court received from the jury, and which neither he nor his counsel have ever seen, as he is by the oral communication through the bailiff to the jury.

Respondent recognizes that petitioner has questioned the contents of the first note, but dismisses this with the remark that "the trial judge announced that it 'stated that the jury could not agree. That is all they said' (R. 365a)." (Res.Br. 7). The point cannot be disposed of so readily. In context it is not clear that the judge was as precise in his recollection as the partial quotation above would suggest. He continued by making an a priori argument as to why that must have been

what the jury had said (365a), and a moment later said that the missing note "was at least in substance the same" as the second note from the jury, which is a matter of record. When the point was made that the second note had been read into the record, quite unlike the first note, the court's comment was: "I don't remember." (365a).

Even if the trial court's recollection were as forceful as respondent understands it to be, it would not answer the point. The record does not show what was in the note the jury sent the judge. It shows only what the judge said, five days later, was in the note. It implies no disrespect for federal judges in general, or for the judge who presided at the trial of this case in particular, to suggest that human memory is a fallible thing. Elaborate rules in the law of evidence have been built on the proposition that "as respects oral testimony purporting to give from memory the terms of a writing, there is a special risk of error, greater than in the case of attempts at describing other situations generally." McCormick, Evidence 410 (1954). If a witness in a suit—even though he be a federal judge—were called to testify as to the important writing, he would not be permitted to describe its contents without first accounting for nonproduction of the original, and then would be subject to searching cross-examination to test the accuracy of his recollection.

This illustrates one of the most important reasons for the rule against communications between court and jury save in the presence of the defendant. When that rule is departed from, as here, either the subsequent statement of the judge as to what transpired must

be accepted without question, which would be unrealistic, or the judge must be subjected to cross-examination and impeachment, which would be undesirable. Rigorous insistence on the rule against private communications maintains the role of the judge as an impartial mediator whose word need never be questioned, and best maintains the confidence of the bar and the public in the federal judiciary.

There are things which may have been said in the missing note which would have been highly prejudicial to petitioner. See *Mullin v. United States,* 356 F.2d 368 (D.C. Cir. 1966). We do not know if they were said. There are things which the bailiff may have said to the jury which would have been highly prejudicial. See *Wheaton v. United States,* 133 F2d 522 (8th Cir. 1943). We do not know if they were said. The plain fact is that neither petitioner nor respondent knows, or can know, whether petitioner was harmed by the "obvious error" in violation of his constitutional right which took place at the trial. The suggestion that petitioner stood mute in the trial court, gambling on an acquittal (Res.Br. 8), is belied by his three motions for a mistrial. The conviction should not stand in these circumstances.

Respectfully submitted,

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August 8, 1966